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No. 106

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

THE DENVER UNION STOCK YARD COMPANY,
Petitioner,

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF FOR THE DENVER UNION STOCK YARD COMPANY

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BRIEF FOR THE DENVER UNION STOCK YARD COMPANY

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (R. 77-84) is reported at 241 F. 2d 192. The decision and order of the Judicial Officer [1]

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[1] The Judicial Officer acted for the Secretary of Agriculture pursuant to delegated authority. 10 F.R. 13769; 11 F.R. 177A-333; 18 F.R. 3219, 3648; 19 F.R. 74. The Judicial Officer exercises final authority within the Department of Agriculture with respect to adjudicatory functions of the Secretary under a number of regulatory statutes, including the Packers and Stockyards Act of 1921, as amended (42 Stat. 159, as amended, 7 U.S.C. 1952 ed.

of the United States Department of Agriculture (R. 6-33) are reported at 15 Agr. Dec. 638.

JURISDICTION

The judgment of the court below (R. 84) was entered on February 15, 1957. The petition for a writ of certiorari was filed on April 17, 1957, and was granted on June 3, 1957 (R. 87). The jurisdiction of this Court rests on 5 U.S.C. 1952 ed. § 1040 and 28 U.S.C. 1952 ed. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The statutory provisions principally involved, §§ 301, 304, 307, and 310 of the Packers and Stockyards Act (7 U.S.C. 1952 ed. §§ 201, 205, 208, and 211) are set forth in Appendix A, *infra*, pp. 69-70.

Regulation 10(c) of the petitioner ("Stock Yard Company") (R. 39, 78-79) is set forth in Appendix B, *infra*, pp. 71-72.

QUESTIONS PRESENTED

The respondent ("Association") challenged Regulation 10(c)—issued by the Stock Yard Company—by initiating an administrative proceeding under the Packers and Stockyards Act (7 U.S.C. 1952 ed. § 181 *et seq.*) before the Secretary of Agriculture. The Judicial Officer, holding that he would not be authorized to set the regulation aside in the absence of evidence that it is "unreasonable," dismissed the complaint

§ 181 *et seq.*). The decisions of the present incumbent of this position—who has been the Judicial Officer since 1942—are published monthly in the *Agriculture Decisions*, currently comprising 16 volumes and including over 1400 decisions in cases involving the Packers and Stockyards Act.

when the Association refused to present evidence at a hearing on the facts but relied on its contention that the Judicial Officer should declare the regulation invalid on its face as a matter of law. The court below reversed the decision of the Judicial Officer and directed him to enter an order in the administrative proceeding requiring the Stock Yard Company to cease and desist from enforcing its regulation. The following questions are presented:

(1) Did the court below err in holding that it could assume facts not in the record and, upon such assumptions, declare the company regulation to be invalid and in violation of the statutory duty of the Stock Yard Company to establish just, reasonable, and nondiscriminatory regulations?

(2) Did the court below err in deciding that the "full hearing" required by § 310 of the Packers and Stockyards Act (7 U.S.C. 1952 ed. § 211) as a condition to a finding of unreasonableness, as applied to a stockyard company regulation, did not require the party complainant to submit evidence to support its claim of unreasonableness?

(3) Did the court below err in invading the statutory discretion of the Secretary of Agriculture by ordering the Secretary, without any factual record, to issue an order requiring the Stock Yard Company to cease and desist from enforcing its business regulation?

STATEMENT

A. *Prefatory.*—A proceeding was brought by the Association in the court below under the Hobbs Act (64 Stat. 1129, as amended, 5 U.S.C. 1952 ed. (and Supp. IV) § 1031 *et seq.*) to secure a judicial review

of an administrative decision of the Judicial Officer, acting for the Secretary of Agriculture, made under the Packers and Stockyards Act (7 U.S.C. 1952 ed. § 181 *et seq.*).

Since 1921, the interstate marketing of livestock has been subject to regulation by the Secretary of Agriculture under Title III of the Packers and Stockyards Act (7 U.S.C. 1952 ed. §§ 201-217a, inclusive).[2] A "stockyard" found by the Secretary to be within the definition contained in the Act (§ 302(a), 7 U.S.C. 1952 ed. § 202(a)) is "posted" by the Secretary (§ 302(b), 7 U.S.C. 1952 ed. § 202(b)); and, thereafter, no "market agency" or "dealer" may operate at the stockyard unless "registered" with the Secretary (§ 303, 7 U.S.C. 1952 ed. § 203). A "market agency" means any "person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services" (§ 301(c), 7 U.S.C. 1952 ed. § 201(c)). The statute defines the term "stockyard services" to mean "services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock" (§ 301(b), 7 U.S.C. 1952 ed. § 201(b)).

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[2] Under Title III of the Act (§§ 301-317, 7 U.S.C. 1952 ed. §§ 201-217a), the Secretary regulates both rates and trade practices of the stockyards industry. Under other titles of the Act—not here involved—, the Secretary regulates packers (Title II of the Act, §§ 201-205, 7 U.S.C. 1952 ed. §§ 191-195) and live poultry dealers and handlers (Title V of the Act, §§ 501-505, 7 U.S.C. 1952 ed. §§ 218-218d). Titles I and IV of the Act (§ 2 and §§ 401-408, 7 U.S.C. 1952 ed. §§ 181-183 and §§ 221-229) contain definitions and general provisions applicable to all of the Titles of the Act.

A "dealer" means "any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser" (§ 301(d); 7 U.S.C. 1952 ed. § 201(d)). A "stockyard owner" is "any person engaged in the business of conducting or operating a stockyard" (§ 301(a), 7 U.S.C. 1952 ed. § 201(a)).

Section 304 of the Act makes it the ". . . duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard . . ." (7 U.S.C. 1952 ed. § 205). Section 307 makes it ". . . the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful." (7 U.S.C. 1952 ed. § 208).

Section 310 of the Act provides that, "[w]henever after full hearing upon a complaint . . . the Secretary is of the opinion that any . . . regulation . . . of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory," the Secretary "[m]ay determine and prescribe . . . what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed," and the Secretary may, by order, require the stockyard owner or market agency to ". . . cease and desist from such violation to the extent to which the Secretary finds that it does or will exist" and to ". . . conform to and

observe the regulation and practice so prescribed" (7 U.S.C. 1952 ed. § 211).

Pursuant to his authority to issue rules and regulations to effectuate the provisions of the Packers and Stockyards Act (§ 407, 7 U.S.C. 1952 ed. § 228), the Secretary has issued general regulations relating to the posting of stockyards, the registration of market agencies and dealers, and the furnishing of facilities and services at posted public stockyards (9 CFR § 201.1 *et seq.*). In these regulations, the Secretary has made it clear that his own regulations ". . . shall not prevent the legitimate application or enforcement of any valid . . . regulation" of a stockyard owner which is ". . . not inconsistent or in conflict with" the Act and the secretarial regulations (9 CFR § 201.4(a)).

Such secretarial regulations also require registered market agencies or dealers at a "posted" stockyard to apply to the stockyard owner for the use of pens and facilities necessary in the conduct of the business of the applicant; and the stockyard owner is directed to make no assignment of such facilities to any such market agency or dealer which would, *inter alia*, ". . . impair the efficiency of operations or the reasonableness of stockyard services furnished patrons of the market" (9 CFR § 201.79(b)).[3]

The secretarial regulations also provide, specifically, that no market agency shall ". . . enter into any agreement, relationship, or association . . . which might have a tendency to lessen the loyalty of the market agency

[3] The patrons of a "posted" stockyard are the persons who ship livestock to the stockyard for sale and those who purchase livestock at the stockyard.

to its consignors or impair the quality of the market agency's selling services" (9 CFR § 201.61(a)). It is further provided in the secretarial regulations that "[n]o market agency or licensee shall solicit consignments of livestock or live poultry at or on stockyard premises or in designated areas or after such livestock or live poultry has been billed or consigned to a market agency or licensee and is in the course of transportation for delivery to the consignee at a posted stockyard or in a designated area" (9 CFR § 201.63).

The Secretary has also issued rules of practice relative to administrative proceedings conducted under the Packers and Stockyards Act (9 CFR § 202.1 *et seq.*), including rules of practice relative to the adjudicatory proceeding involved in the case at bar (9 CFR § 202.5 —§ 202.22, inclusive).

B. *The Administrative Proceeding.*—The Association brought an administrative proceeding under the Packers and Stockyards Act (7 U.S.C. 1952 ed. § 181 *et seq.*), challenging the validity of Regulation 10(c) of the Stock Yard Company (R. 39). In accordance with the applicable rules of practice (9 CFR § 202.6 (b)), the proceeding was conducted against the Stock Yard Company as the respondent upon the basis of the complaint filed by the Association (R. 60-61). In its complaint, the Association alleged that it is a "market agency," registered with the Secretary of Agriculture, doing business on the "posted" stockyard of the Stock Yard Company at Denver, Colorado. As a "market agency" the Association, acting as agent for the buyer or seller, alleged that it buys and sells livestock for others on a commission basis. The Association asserted that Regulation 10(c) is invalid and

prayed that the regulation be set aside and annulled (R. 42).

The Stock Yard Company filed an answer (R. 44-48), admitting the identity of the parties and the issuance of Regulation 10(c), denying all of the factual allegations and legal conclusions in the complaint, and alleging, *inter alia*, that Regulation 10(c) was established by it under § 307 of the Act (7 U.S.C. 1952 ed. § 208) in an endeavor to cure abuses of the fiduciary relationship between certain market agencies and the patrons of the Denver stockyard which tended to prevent the Stock Yard Company and the market agencies at the Denver stockyard from furnishing reasonable stockyard services to the patrons of the Denver stockyard as required by § 304 of the Act (7 U.S.C. 1952 ed. § 205). The Stock Yard Company also demanded a hearing on the facts and the law (R. 47-48).[4]

After the case was assigned to a hearing examiner,[5]

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[4] The rules of practice applicable to the administrative proceeding provide that the term "hearing" means that part of the proceeding which involves the submission of evidence (9 CFR § 202.2(g)). The rules further provide that a respondent "may request an oral hearing on the facts" by including such a request in its answer (9 CFR § 202.11(a)). Failure to request such a hearing on the facts is deemed to constitute a waiver of such a hearing and an agreement that the administrative proceeding may be decided upon the basis of a record formed under the shortened procedure provided by § 202.17 of the rules of practice (9 CFR § 202.17). As noted, the Stock Yard Company, which was the respondent in the administrative proceeding, made a timely request for a hearing on the facts in its answer.

[5] Administrative proceedings of this nature are conducted, in the first instance, before a hearing examiner; thereafter, final adjudication is made by the Judicial Officer on behalf of the Secretary of Agriculture. See note 1, *supra*.

the Stock Yard Company—in preparation for the administrative hearing on the facts—applied, under the rules of practice (9 CFR § 202.13), for a subpoena *duces tecum* to examine specified books and records of the Association (R. 48). The purpose of the subpoena was to secure substantiation of facts already known which showed abuses of fiduciary relationships by the Association (R. 50)—abuses which the Stock Yard Company contended its challenged regulation was designed to cure (R. 44-48).

The Association opposed such application for a subpoena, contending that no hearing on the facts was necessary, that the challenged regulation is invalid on its face as a matter of law, and that an order should forthwith be entered requiring the Stock Yard Company to cease and desist from enforcing its regulation (R. 54). But the hearing examiner rejected these contentions of the Association (R. 70-71), holding that the basic question in the administrative proceeding was whether the Stock Yard Company had failed to furnish "reasonable" stockyard services at the Denver stockyard as required by § 304 of the Act (7 U.S.C. 1952 ed. § 205), or had set up some "unreasonable" regulation in respect to the furnishing of such stockyard services as prohibited by § 307 of the Act (7 U.S.C. 1952 ed. § 208). He further held that, ". . . the question of reasonableness depends upon facts, the circumstances surrounding the action taken. * * *" (R. 71). Therefore, in accordance with the rules of practice (9 CFR § 202.11(b)), the hearing examiner set a time and place for a hearing to receive evidence and indicated that, after the Association had presented its evidence at the hearing as to the "unreasonableness" of Regulation 10(c), the subpoena requested by

the Stock Yard Company would then be issued if the Stock Yard Company still needed the subpoena. See Interim Ruling and Notice of Hearing (R. 70-71).

Thereupon, the Association filed an "Election to Rest" (R. 72) in which it stated that it elected ". . . to stand upon the illegality of said regulation, as a matter of law," and in which it reiterated its contention that Regulation 10(c) "is illegal and invalid upon its face." In its "Election to Rest," the Association also stated that it refused to go to a hearing on the facts or to present evidence in support of its allegations as to the invalidity of the challenged regulation. The Association stated that ". . . it will not present evidence in this cause, as the taking of evidence is unnecessary to determine the illegality of said regulation as a matter of law" (R. 72). The Association concluded its "Election to Rest" by stating that it ". . . hereby rests and submits its case for final decision by the Secretary of Agriculture" (R. 72).

The respondent moved to dismiss the complaint because of the Association's refusal to proceed as required (R. 73).

Under these circumstances, the hearing examiner concluded—in accordance with the rules of practice (9 CFR § 202.10(b))—that the proceeding should be ". . . certified to the Judicial Officer for decision, with a recommendation that it be dismissed" (R. 73). In certifying the proceeding to the Judicial Officer, the hearing examiner took note of the Association's "Election to Rest" without presenting evidence, and he referred to his previous ruling to the effect that the validity of the challenged regulation of the Stock Yard Company could only be decided in the light of its "rea-

sonableness" and that ". . . the question of reasonableness depends upon facts, the circumstances surrounding the action taken. * * *" (R. 71).

The Judicial Officer received briefs and listened to legal argument devoted solely to the legal issues raised before him: *viz.*, the Association's contention that the regulation should be declared invalid on its face as a matter of law without the consideration of evidence developed at a factual hearing and the Stock Yard Company's contention that the Judicial Officer would not be authorized to do so. The Judicial Officer decided that, upon the limited record before him—devoid of facts—he could not find that Regulation 10(c) of the Stock Yard Company is invalid on its face as a matter of law (R. 6-33). He stated that, in the administrative proceeding under the Packers and Stockyards Act, he would not be authorized to set the business regulation of the Stock Yard Company aside without evidence that it is "unreasonable" (R. 32). He dismissed the complaint in view of the Association's election not to appear at a hearing upon the facts and present evidence in support of its charge that the regulation is 'unreasonable." The Judicial Officer also stated ". . . that section 310 of the act requires that a 'full hearing' precede a determination by the Secretary that a regulation of a stockyard company for or in connection with the furnishing of stockyard services is unjust, unreasonable, or discriminatory. * * *" (R. 32). In his decision, the Judicial Officer stated plainly that, upon the limited record before him, he was not making any finding as to the "reasonableness" or "unreasonableness" of Regulation 10(c), since there were no facts in the record upon which such a determination could properly be made.

but that he was simply deciding that the regulation could not be declared invalid on its face as a matter of law (R. 16).

C. *The Decision of the Court of Appeals.*—The Association then filed a petition in the United States Court of Appeals for the Tenth Circuit, seeking a judicial review under the Hobbs Act (64 Stat. 1129, as amended, 5 U.S.C. 1952 ed. (and Supp. IV) § 1031 *et seq.*) of the decision and order of the Judicial Officer. The United States and the Secretary of Agriculture were named respondents in the court below (R. 1), and the Stock Yard Company intervened as a respondent in the Court of Appeals as a matter of right (R. 33-34).

The Court of Appeals—without any record of evidence before it—reversed the decision of the Judicial Officer, declaring that the regulation of the Stock Yard Company is invalid upon its face as a matter of law (R. 77-84). In reaching this conclusion, the court below held that the "full hearing" provision of § 310 of the Act (7 U.S.C. 1952 ed. § 211) did not require either the court or the Secretary to consider evidence but that the provision had been satisfied by "according the parties the right of argument" as to the law (R. 81-82). The lower court also held that all evidence as to the challenged regulation is immaterial—no matter by whom presented (R. 81). In the view of the lower court, Regulation 10(c) of the Stock Yard Company ". . . is in immediate conflict with the requirement of Sec. 304 [7 U.S.C. 1952 ed. § 205] which contemplates and imposes the duty upon marketing [*sic*] agencies to render reasonable services to its [*sic*] customers at *every* stockyard where they do business" (Emphasis supplied by lower court) (R. 82). The lower court

held that such a conflict would exist as applied to the following factual situation conjectured by it:

> "If by rendering reasonable services for a Colorado customer at one stockyard a marketing [*sic*] agency is prohibited from rendering reasonable service for the same or a different Colorado customer at another stockyard it is apparent that the agency can not perform its statutory duty in one regard or another" (R. 82).

The lower court further declared—contrary to the decision of the Judicial Officer—that it was of "no legal significance" if the ability of both the Stock Yard Company and the market agencies at the Denver stockyard to render efficient stockyard services to the patrons of the Denver stockyard would be impaired in the absence of Regulation 10(c) (R. 82). Further, although the Judicial Officer had made no such findings in view of the Association's election not to attend a hearing on the facts, the court below decided (1) that the sole purpose of the challenged regulation was to protect the economic interests of the Stock Yard Company (R. 82) and (2) that the challenged regulation "wounds the public interest" (R. 83). Accordingly, the lower court concluded ". . . that Regulation 10(c) is an unlawful restriction upon the statutory rights and duties of [the Association] and all market agencies and bears no reasonable relationship to the duties required of the stockyard company under the provision [*sic*] of the Packers and Stockyards Act" (R. 83-84). The court below then remanded the case to the Judicial Officer, with instructions, "to vacate the order dismissing [the Association's] complaint and enter an appropriate order requiring the Denver Union Stock Yard Company to cease and desist from issuing or enforcing its Regulation 10(c)" (R. 84).

SUMMARY OF ARGUMENT

I.

The Stock Yard Company submits that the Court of Appeals did not properly perform its function as a court charged with the duty of reviewing administrative action. The only proper question before the court below related to the validity of the order of the Judicial Officer in the administrative proceeding which dismissed the complaint when the Association refused to appear at a hearing and present evidence in support of its charge that the regulation of the Stock Yard Company is "unreasonable."

The Judicial Officer correctly concluded that, in view of the regulatory scheme contemplated by the Packers and Stockyards Act—providing, *inter alia*, that the Secretary may set aside a business regulation of a stockyard company only after a "full hearing" (§310, 7 U.S.C. 1952 ed. § 211)[6]—, he would not be authorized to require the Stock Yard Company, in the administrative proceeding, to cease and desist from enforcing its regulation in the absence of evidence that the regulation is "unreasonable" (R. 33).

The court below committed fundamental error—requiring reversal by this Court—in holding that the "full hearing" provision of § 310 of the Act did not require either the reviewing court or the Judicial Officer to consider evidence and that the hearing require-

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[6] Section 312 of the Act likewise makes a "full hearing" a prerequisite to the issuance of a cease and desist order by the Secretary relative to unfair, unjustly discriminatory, or deceptive practices or devices of a stockyard owner, market agency, or dealer in connection with the handling of livestock (7 U.S.C. 1952 ed. § 213).

ment had been satisfied by according the parties the right of argument on the sole legal issue sought to be raised by the Association (R. 81-82); that all evidence as to the purpose, operation, and effect of Regulation 10(c) of the Stock Yard Company was immaterial to the issue of the "reasonableness" of the regulation (R. 81); and that, as applied to hypothetical facts not in the record but conjectured by it, the regulation would, in its opinion, be invalid (R. 82).

(A) A threshold issue—dispositive of the case—arises from the circumstance that, admittedly, no factual hearing was held because the Association, which was the complainant in the administrative proceeding, refused to attend such a hearing and present evidence, contending, instead, that the Judicial Officer should, without a factual hearing, set aside the regulation of the Stock Yard Company (R. 72). But at the outset of the administrative proceeding, the Stock Yard Company demanded a hearing on the facts and the law (R. 47-48), never waived its right to such a hearing, and never elected, in any manner, to have the validity of its regulation decided as a matter of law without regard to the facts. The Judicial Officer properly upheld the contention of the Stock Yard Company that the cease and desist order sought by the Association could not be issued in the absence of a "full hearing" both on the facts and the law (R. 32). This is not a case in which the administrative agency refused to hold a hearing on the facts or attempted to impose a sanction in the absence of a hearing. In the administrative proceeding, a time and place for a hearing on the Association's complaint was set (R. 71). But the Association refused to appear, contending that such a hearing was unnecessary and stating that it elected to

stake the outcome of the proceeding on its contention that the regulation is invalid on its face as a matter of law (R. 72).

By holding ". . . that the submission of evidence is not required to characterize a 'full hearing' " and that the "full hearing" requirement of § 310 of the Act (7 U.S.C. 1952 ed. § 211) had been satisfied by "according the parties the right of argument" on the law (R. 81-82), the lower court ignored prior decisions of this Court. These include decisions holding that § 310 of the Packers and Stockyards Act requires a hearing both on the law and the facts. *Morgan* v. *United States*, 304 U.S. 1, 15; *Morgan* v. *United States*, 298 U.S. 468, 480. As pointed out by the Judicial Officer (R. 28), critical factual issues were raised by the complaint and the answer. When the Association refused to attend a factual hearing and present evidence in support of its charges, the Judicial Officer was clearly warranted in dismissing the Association's complaint.

If allowed to stand, the decision of the court below, holding that a hearing on the facts is unnecessary in cases of this type, will have far-reaching adverse consequences both on the Secretary who is charged with the administration of the Act and on the more than 500 stockyards subject to regulation under it.

(B) The court below also erred by holding, as a matter of law, that evidence was "immaterial to the issue to be decided" because, in that court's opinion, it was unnecessary to consider evidence on the issue as to the "reasonableness" or "unreasonableness" of the regulation and as to the furnishing of stockyard services at the Denver stockyard (R. 81).

(1) The statutory standard under the Packers and Stockyards Act by which the regulation must be tested relates to whether it is a "reasonable" regulation in respect to the furnishing of "reasonable" stockyard services (§§ 304, 307, 7 U.S.C. 1952 ed. §§ 205, 208). The Stock Yard Company is required to issue such regulations. The regulation may be set aside only if it is "unreasonable" (§ 310, 7 U.S.C. 1952 ed. § 211). The consideration by the Secretary of evidence as to the essential facts of the industry is the pivotal circumstance upon which the whole administrative process for regulating the stockyards industry depends. This is the reason why the Congress resorted to the administrative process in the first place.

(2) Application of the statutory standard of "reasonableness" to the challenged regulation thus involves a factual inquiry and an intimate understanding of the technical problems of the stockyards industry, since questions of "reasonableness" can not be resolved by any fixed rule of law or precise formula but only upon consideration of all the pertinent facts in each case in the light of the objectives of the Packers and Stockyards Act. *Sugar Institute* v. *United States*, 297 U.S. 553, 600; *Standard Oil Company* v. *United States*, 283 U.S. 163, 179; *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238; *Kelly* v. *Union Stockyard and Transit Company* (C.C.A. 7), 190 F. 2d 860, 864. Consideration must be given, *inter alia*, to evidence as to the type of "stockyard services" furnished at the particular stockyard; to who furnishes the different kinds of services available; to the effect of the challenged regulation upon the furnishing of such "stockyard services"; and to other pertinent facts of a complex nature.

The record here is barren of all evidence, and it was error for the lower court to reject the Judicial Officer's decision that the statutory standard requires the consideration of evidence as to the facts and that the validity or invalidity of the challenged regulation cannot be determined solely as a matter of law.

(3) Appropriate regard for the statutory standard of "reasonableness"—and the primary responsibility of the Secretary—made it highly improper for the Court of Appeals to declare the challenged regulation invalid on its face as a matter of law on the theory that the regulation would be invalid, in the lower court's view, as applied to hypothetical facts conjectured by it and never considered by the Secretary. But that is exactly what the lower court did. It conjectured a hypothetical situation, held that the Stock Yard Company's regulation would be invalid as applied to such conjectured facts, and found that the regulation "wounds the public interest." In so doing, the court below ignored the repeated admonitions of this Court that nothing should be treated as evidence which is not in the record and that courts should deal with cases upon the basis of the facts of record and never with non-existent, assumed, or fanciful circumstances. *Electric Bond and Share Company* v. *Securities and Exchange Comm'n*, 303 U.S. 419, 443; *Associated Press* v. *Labor Board*, 301 U.S. 103, 132; *Morgan* v. *United States*, 298 U.S. 468, 480; *Chicago Board of Trade* v. *Olson*, 262 U.S. 1, 42.

(4) The lower court compounded its error by striking down the challenged regulation *in toto* merely because, in that court's view, the regulation would be invalid as a matter of law as applied to a "market agency" in a single conjectured situation. Yet the

regulation also applies to "dealers" who have not attacked the regulation and to situations in which regulation by the Secretary and stockyard owners has uniformly been upheld for years. Thus, the court below has barred all regulation by erroneously holding that regulation in a situation not shown to exist would be invalid. This Court has declared that this may not be done. *Associated Press* v. *Labor Board*, 301 U.S. 103, 132.

(5) Under the regulatory scheme of the Packers and Stockyards Act, primary jurisdiction lay with the Secretary—not the reviewing court—to apply the statutory standard of "reasonableness"; and the lower court was clearly unwarranted in substituting its judgment for that of the responsible administrative official by holding that it was unnecessary either for the Judicial Officer or for the court to consider evidence on the issue as to the "reasonableness" of the regulation. *United States* v. *Morgan*, 313 U.S. 409, 417; *St. Joseph Stockyards Company* v. *United States*, 298 U.S. 38, 51; *Tagg Bros. v. United States*, 280 U.S. 420, 442-445. *A fortiori*, this is true where, as here, the responsible administrative official had never considered the conjectured facts upon which the lower court based its judgment. *Kelly* v. *Union Stockyard and Transit Company* (C.C.A. 7), 190 F. 2d 860, 864; *United States* v. *Brown* (D.C. Okla.), 4 F. 2d 270, 271. See, also, *United States* v. *Western Pacific Ry.*, 352 U.S. 59.

II.

By directing the Judicial Officer, without any factual record, to reopen the administrative proceeding and to enter a cease and desist order, the Court of Appeals also wrongfully interfered with the discre-

tionary authority conferred exclusively by the Congress upon the Secretary. The function of the court below was strictly limited, by the Hobbs Act, to determining whether the Judicial Officer was warranted in dismissing the complaint of the Association in the administrative proceeding when the Association refused to go to a factual hearing. 5 U.S.C. 1952 ed. (and Supp. IV) § 1031 *et seq.* Under § 310 of the Packers and Stockyards Act (7 U.S.C. 1952 ed. § 211), the Secretary has discretion as to how to proceed if it is determined that a regulation is "unreasonable." But the lower court not only wrongfully declared the challenged regulation of the Stock Yard Company invalid on its face as a matter of law, but it also preempted to itself all of the discretionary authority thus conferred upon the Secretary. Even if the Judicial Officer had erred, the function of the court below was limited to a consideration of any such errors and, under no circumstances, did the court below have authority to direct the Judicial Officer how to proceed within the discretionary framework of his authority. This Court has repeatedly made this point clear. *Securities and Exchange Comm'n* v. *Chenery Corporation*, 332 U.S. 194, 200-201; *Rochester Telephone Corporation* v. *United States*, 307 U.S. 125, 136; *Ford Motor Company* v. *Labor Board*, 305 U.S. 364, 375; *Federal Radio Comm'n* v. *Nelson Bros. Company*, 289 U.S. 266, 278.

If allowed to stand, the effect of the decision of the court below will be to prevent the Secretary from exercising his continuing administrative responsibility under the Packers and Stockyards Act, for the meaning of that decision is clear, *viz.*, Regulation 10(e) and all similar regulations are invalid on their face as a matter of law, and the Secretary is not warranted in

holding factual hearings, either on complaint or upon his own initiative, to inquire into the reasonableness of such regulations and to prescribe appropriate remedies if they are found to be "unreasonable." Plainly, such a result would be destructive of the whole administrative process, and the judgment below must be reversed.

ARGUMENT

I.

THE COURT OF APPEALS ERRED IN REVERSING THE DECISION OF THE JUDICIAL OFFICER IN WHICH HE HELD THAT HE COULD NOT FIND REGULATION 10(C) OF THE STOCK YARD COMPANY INVALID ON ITS FACE AS A MATTER OF LAW AND IN THE ABSENCE OF EVIDENCE OF RECORD, PRESENTED BY THE COMPLAINING ASSOCIATION AT A HEARING ON THE FACTS, THAT THE REGULATION IS "UNREASONABLE."

The only question properly before the court below related to the validity of the order of the Judicial Officer dismissing the Association's complaint. 5 U.S.C. 1952 ed. (and Supp. IV) § 1031 *et seq.* Under the rules of practice governing the administrative proceeding (9 CFR § 202.6(b)), the Association was the complainant (R. 39, 60-61). (*Cf., Henderson* v. *United States*, 339 U.S. 816, 818-823; *United States* v. *Interstate Commerce Commission*, 337 U.S. 426, 428-429, 432-434).

The sole purpose of the Association in bringing the administrative proceeding was to secure an order from the Judicial Officer to determine whether Regulation 10(c) of the Stock Yard Company is "unreasonable" within the meaning of that standard as used in the Packers and Stockyards Act, 1921, as amended (7 U.S.C. 1952 ed. § 181 *et seq.*), and, if "unreasonable," to secure an order compelling the Stock Yard Company to cease and desist from enforcing the regulation.

The Stock Yard Company, pursuant to the rules of practice (9 CFR § 202.11(a)), requested an oral hearing on the facts (R. 47-48). In the administrative proceeding, the burden of proof was upon the Association to establish that the regulation is "unreasonable" in fact. Section 7(c), Administrative Procedure Act, 60 Stat. 241, as amended, 5 U.S.C. 1952 ed. § 1006(c); *Platt* v. *Lecocq* (C.C.A. 8), 158 Fed. 723, 728. See, *Swift and Company* v. *United States*, 343 U.S. 373, 382; *Federal Power Comm'n* v. *Hope Natural Gas Company*, 320 U.S. 591, 602, and *Louisville and Nashville R.R.* v. *United States*, 238 U.S. 1, 11.

But after the Hearing Examiner indicated that he was prepared to issue a subpoena *duces tecum* requiring the Association to produce certain of its books and records for use by the Stock Yard Company at a hearing on the facts (R. 70-71), the Association promptly announced that it would refuse to appear at such a hearing and to offer evidence in support of its allegations as to the "unreasonableness" of the regulation of the Stock Yard Company (R. 72). Instead, the Association requested an immediate ruling by the Secretary—acting through the Judicial Officer—that Regulation 10(c) is invalid on its face as a matter of law (R. 72). In taking this position, the Association contended that evidence as to the "reasonableness" or "unreasonableness" of the regulation is immaterial—no matter by whom presented.

The Judicial Officer rejected the Association's contention that the regulation of the Stock Yard Company could be declared invalid on its face as a matter of law, holding that, without a factual hearing, he could not determine the validity of Regulation 10(c) and, further, that he would not be authorized to do so (R. 32). The Judicial Officer dismissed the Association's com-

plaint in view of the Association's election not to attend and to present evidence at a hearing on the facts in support of its complaint (R. 32-33).

The Judicial Officer had no authority, in the administrative proceeding, to require the Association to rely on any position other than the position which the Association took. Since the Judicial Officer concluded that he could not uphold the Association's novel contention, he properly exercised his discretion under the Packers and Stockyards Act by dismissing the complaint.[7] In the particular administrative proceeding involved herein, the Judicial Officer was concerned only with the proper disposition of the complaint of the Association when he concluded that he could not agree with the Association's argument that he should declare Regulation 10(*c*) invalid as a matter of law without any factual hearing and in the absence of any evidence showing that it is "unreasonable." Dismissal of the Association's complaint by the Judicial Officer did not, of course, thereafter foreclose the Secretary from taking any proper action—either on his own initiative or upon a proper complaint of another person—with regard to Regulation 10(*c*) of the Stock Yard Company or similar regulations of other stockyard companies, if he were to deem such action appropriate. But the action of the Court of Appeals in ordering the Secretary to reopen this particular administrative proceeding and—without any hearing on the pertinent facts—to issue a cease and desist order against the Stock Yard Company has effectively foreclosed the

[7] An order dismissing a complaint in an administrative proceeding is an exercise of administrative discretion no less than would be an order requiring affirmative action. *Rochester Telephone Corporation* v. *United States*, 307 U.S. 125, 142.

Secretary from exercising his administrative responsibilities with regard to Regulation 10(c) and similar regulations at other stockyards.

Notwithstanding that the only question properly before the lower court related to the validity of the order of the Judicial Officer dismissing the Association's complaint, that court ignored its sole proper function and substituted its judgment for that of the Judicial Officer by deciding that Regulation 10(c) of the Stock Yard Company is invalid on its face as a matter of law. The court below further held that the submission of evidence is not necessary to constitute the "full hearing" required by § 310 of the Packers and Stockyards Act (7 U.S.C. 1952 ed. § 211) and that such "full hearing" provision of the law had been satisfied in the administrative proceeding by "according the parties the right of argument" on the law (R. 81-82). The lower court also held that evidence as to the purpose, operation, and effect of the challenged regulation—no matter by whom presented—is immaterial (R. 81); and that as applied to hypothetical facts not in the record but conjectured by it, the regulation would, in its opinion, be invalid.[8]

As will appear in the following parts of this argument, the opinion and judgment of the Court of Appeals is in conflict with prior decisions of this Court; and, moreover, the lower court departed from the accepted and usual course of judicial proceedings involv-

[8] The Court of Appeals reached these conclusions in spite of the fact that, under the terms of the Hobbs Act, in reviewing the Judicial Officer's action in dismissing the Association's complaint, the reviewing court was confined to a consideration of the record in the administrative proceeding (5 U.S.C. 1952 ed. (and Supp. IV) § 1031 *et seq.*

ing the review of administrative action under important regulatory statutes such as the Packers and Stockyards Act.

Only by a reversal by this Court of the opinion and judgment of the lower court will the Stock Yard Company—and all other stockyard companies regulated under the Packers and Stockyards Act—be accorded the procedural safeguards imposed by the Congress with respect to the regulation of their activities and will the Secretary of Agriculture be able to administer this important regulatory statute in the manner contemplated by the Congress.

A.

A "Full Hearing" on the Facts, as Well as the Law, Is An Indispensable Prerequisite to the Authority of the Secretary to Issue An Order Under § 310 of the Packers and Stockyards Act Requiring the Stock Yard Company to Cease and Desist from Enforcing Its Regulation Herein Involved.

A threshold error—requiring reversal by this Court for this reason alone—was made by the Court of Appeals in holding that the "submission of evidence is not required" to constitute a "full hearing" under § 310 of the Packers and Stockyards Act (7 U.S.C. 1952 ed. § 211) and that the "full hearing" requirement had been satisfied here by "according the parties the right of argument" merely on legal issues (R. 81-82).

Section 310 of the Act provides that the Secretary may take certain prescribed action—

> "Whenever after full hearing upon a complaint . . ., the Secretary is of the opinion that any . . . regulation . . . of a stockyard owner . . ., for or in connection with the furnishing of stockyard serv-

ices, is or will be unjust, unreasonable, or discriminatory. . . ."

In holding that the "full hearing" provision of § 310 of the Act had been satisfied by "according the parties the right of argument" on the law (R. 81), the lower court also decided that "evidence is immaterial to the issue to be decided"[9] (R. 81).

It is the position of the Stock Yard Company that the Judicial Officer properly held that § 310 of the Act requires that a "full hearing" both on the facts and the law must precede a determination by the Secretary that a regulation of a stockyard company "for or in connection with the furnishing of stockyard services is unjust, unreasonable or discriminatory" (R. 32).

In view of the positive statutory requirement and of the crucial factual issues made by the pleadings in the administrative proceeding (R. 28), the Judicial Officer correctly concluded that he would not be authorized to set Regulation 10(c) aside without evidence that it is unjust, unreasonable, or discriminatory.

In holding otherwise, the opinion of the court below conflicts with prior decisions of this Court that § 310 of the Act provides, without qualification, that a cease and desist order may be issued only after full hearing upon a complaint and that such hearing involves the right to submit evidence, as well as to make legal argument.

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[9] The error of the lower court in holding that "evidence is immaterial to the issue to be decided" is discussed in this argument, *infra*, pp. 34-65, where it is shown that the statutory standard of "reasonableness"—by which Regulation 10(c) must be tested—requires a full consideration of facts by the Secretary since such a standard cannot be applied by any fixed rule of law or precise formula.

In *Morgan* v. *United States*, 298 U.S. 468, this Court said, at page 477,

> "* * * If upon the facts alleged, the 'full hearing' required by the statute was not given, plaintiffs were entitled to prove the facts and have the Secretary's order set aside. Nor is it necessary to go beyond the terms of the statute in order to consider the constitutional requirement of due process as to notice and hearing. For the statute itself demands a full hearing and the order is void if such a hearing was denied. * * *."

Further, in discussing the authority conferred upon the Secretary by §310 of the Act, this Court stated that the Secretary must comply with fundamental procedural requirements. At page 480, this Court said:

> "* * * There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. * * *. Facts and circumstances which ought to be considered must not be excluded. Facts and circumstances must not be considered which should not legally influence the conclusion. Findings based on the evidence must embrace the basic facts which are needed to sustain the order. * * *.
>
> "* * * The requirement of a 'full hearing' has obvious reference to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts. * * *. The 'hearing' is the hearing of evidence and argument. * * *."

In the second *Morgan* case (*Morgan* v. *United States*, 304 U.S. 1), this Court also said, at page 14:

> "* * * The vast expansion of this field of administrative regulation in response to the pressure of social needs is made possible under our system

> by adherence to the basic principles that the legislature shall appropriately determine the standards of administrative action and that in administrative proceedings of a quasi-judicial character the liberty and property of the citizen shall be protected by the rudimentary requirements of fair play. These demand 'a fair and open hearing,' essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard.' * * *. And in equipping the Secretary of Agriculture with extraordinary powers under the Packers and Stockyards Act, the Congress explicitly recognized and emphasized this requirement by making his action depend upon a 'full hearing.' "

The legislative history of the Packers and Stockyards Act shows that it was modeled closely on the Interstate Commerce Act (24 Stat. 379, as amended, 49 U.S.C. 1952 ed. § 1 *et seq.*). The committee report which accompanied the bill which became the Packers and Stockyards Act pointed out that the authority of the Secretary of Agriculture to issue cease and desist orders, like that of the Interstate Commerce Commission, is conditioned upon the holding of a "full hearing" (House Report No. 77, 67th Congress, 1st Sess., p. 10). This Court also has heretofore pointed out the close relationship between the Packers and Stockyards Act and the Interstate Commerce Act, *Stafford* v. *Wallace*, 258 U.S. 495, 522, 523; *Tagg Bros.* v. *United States*, 280 U.S. 420, 442. In the latter case, this Court said that (280 U.S. at p. 442) it is essential to the validity of an order of the Interstate Commerce Commission, in dealing with rates, regulations, and

practices of carriers, that the order must be based upon evidence received at a hearing when the statute calls for a hearing, and that, otherwise, "the order must be set aside." This Court said "[t]hese rules are applicable also to suits arising under the Packers and Stockyards Act."

In numerous cases dealing with the Interstate Commerce Commission, this Court has held that a "full hearing" both on the facts and the law is an absolute prerequisite to the authority of the Commission to act where the action of the Commission is predicated upon holding such a "hearing". Thus, in *Interstate Commerce Commission* v. *Louisville and Nashville R.R.*, 227 U.S. 88, 91, 92, this Court explained the right of the Commission to issue a rate order after a "full hearing" as follows:

> "Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of is fact, and if there was no evidence to show that the rates were unreasonable, there was no jurisdiction to make the order. * * *." (227 U.S., p. 92)

Later, in *The Chicago Junction Case*, 264 U.S. 258, 264, in reversing an order of the Interstate Commerce Commission, this Court said:

> "* * * Congress by using the phrase 'whenever the Commission is of opinion, after hearing,' prescribed quasi-judicial action. Upon application of a carrier, the Commission must form a judgment whether the acquisition proposed will be in the public interest. It may form this judgment only after hearing. The provision for a hearing implies both the privilege of introducing evidence

and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action. As it was admitted by the motion that the order was unsupported by evidence, and since such an order is void, there is no occasion to consider the other grounds of invalidity asserted by plaintiffs."[10]

The same reasoning has been followed by this Court in dealing with other situations in which administrative agencies are authorized to act only after a hearing. *Ohio Bell Telephone Company* v. *Comm'n*, 301 U.S. 292, 304; *Shields* v. *Utah Idaho Central R.R.*, 305 U.S. 177, 182.[11]

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[10] See also *United States* v. *Abilene & Southern Ry.*, 265 U.S. 274, 288; and *B. & O. R. R.* v. *United States*, 277 U.S. 291, 300. Mr. Justice Brandeis, writing for the Court in *The Chicago Junction* case, called attention to the orders which the Interstate Commerce Commission is authorized to make only after a hearing and those which need not be preceded by a hearing. See 264 U.S. at page 265, footnote 10. Similarly, under the Packers and Stockyards Act (7 U.S.C. 1952 ed. 181 *et seq.*), the Secretary is authorized to make certain rules, regulations, and orders without holding any hearing (§ 407 of the Act, 7 U. S. C. 1952 ed. § 228); but the authority of the Secretary to issue a cease and desist order under § 310 of the Act (7 U.S.C. 1952 ed. § 211)—involved in this case—is expressly made to depend upon the holding of a "full hearing."

[11] Other federal and state courts uniformly have held that, where administrative action is made to depend upon the holding of a hearing, such a hearing is an indispensable prerequisite—jurisdictional—to the taking of administrative action. *Powhatan Mining Company* v. *Ickes* (C.C.A. 6), 118 F. 2d 105, 109; *Alabama Power Company* v. *Fort Payne*, 237 Ala. 459, 187 So. 632; *Campbell* v. *Civil Service Commission*, 290 Ill. App. 105, 8 N. E. 2d 49; *Johnson* v. *Johnson*, 92 Montana 512, 15 P. 2d 842; *Atchison T. & S. F. Ry.* v. *Commerce Comm'n*, 335 Ill. 624, 167 N.E. 831; *Los Angeles*

Not only does the holding of the court below thus conflict directly with prior decisions of this Court and other courts that the Secretary of Agriculture would not be authorized to issue a cease and desist order in the absence of a factual hearing, but also the conclusion of the lower court is indefensible from a practical standpoint. When the Congress directed the Secretary to take action under § 310 of the Packers and Stockyards Act (7 U.S.C. 1952 ed. § 211), the Congres followed a pattern which has become increasingly familiar in recent years. It delegated to a responsible administrative official the authority to implement Congressional policy in the light of a statutory standard laid down for his guidance—in this instance, a standard of "reasonableness." It was contemplated by the Congress that the Secretary would deal with numerous factual situations upon which detailed regulation must depend. The only way the Secretary is able to

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& *S. L. Ry.* v. *Public Utilities Comm'n*, 81 Utah 286, 17 P. 2d 287; *Oklahoma Natural Gas Company* v. *Corporation Comm'n*, 90 Okla. 84, 216 P. 917; *Breakenridge* v. *Newark*, 95 N.J. L. 436, 112 A. 857; *Farmers' Elevator Company* v. *Chicago R. I. & P. R. R.*, 266 Ill. 567, 107 N.E. 841; *International Harvester Company* v. *Industrial Comm'n*, 157 Wis. 167, 147 N.W. 53. In *Powhatan Mining Co.* v. *Ickes*, *supra*, the Court of Appeals for the Sixth Circuit said (118 F. 2d at p. 109), in reviewing an order of the Department of the Interior under the old Bituminous Coal Act (Act of April 26, 1937, 50 Stat. 72):

> "* * * But we may not assume that the director would have made the same findings if full hearing had been accorded. The statute requires that in this proceeding notice and hearing be given, and this means that facts and circumstances which ought to be considered must not be excluded, and that the trier of the facts must make his findings based upon the evidence. In other words, the order itself must be based upon full hearing."

ascertain the facts upon which such regulation is conditioned is to hold hearings to receive evidence of the facts.

At the same time, such procedure enables the persons regulated to defend their actions in an orderly fashion. It was never the thought of the Congress that important questions relative to the "reasonableness" of industry rates and regulations of stockyard owners would be determined by the Secretary in the abstract, merely by listening to legal argument. Indeed, the entire administrative process has developed because of the necessity of securing informed judgments based upon administrative hearings of facts in a host of situations with which the Congress could not, itself, deal effectively because of the lack of time or detailed knowledge.

Thus, the decision of the Court of Appeals, holding that the "full hearing" provision of § 310 has been satisfied by "according the parties the right of argument" on the law, is in conflict both with authority and with reason. It will have a serious impact upon all stockyard companies with regard to their statutory responsibility, under § 307 of the Act (7 U.S.C. 1952 ed. § 208), to maintain reasonable regulations in respect to the furnishing of stockyards services and their right to defend such regulations, when challenged, in the manner prescribed by law.

The seriousness of the adverse consequences which will flow from the decision of the lower court that a factual hearing is not required is also well illustrated by the circumstances pointed out by the Secretary of Agriculture in his independent petition for a writ of

certiorari to review the judgment and opinion of the court below.[12]

In his petition, the Secretary showed that various "posted" stockyards have regulations which are similar, or substantially similar, to Regulation 10(c) of the Stock Yard Company which is involved in this proceeding. (See, also, Secretary's brief in No. 118, October Term, 1957, consolidated herewith). If the decision below—holding that such regulations may be declared invalid as a matter of law and without any factual hearing—is allowed to stand, the orderly administration of the Packers and Stockyards Act will come to a standstill.[13]

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[12] This Court granted the Secretary's petition for a writ of certiorari (*Ezra Taft Benson, Secretary of Agriculture of the United States, petitioner* v. *Producers Livestock Marketing Association, respondent*, No. 981, Oct. Term, 1956) on June 3, 1957, the same day that it granted the Stock Yard Company's petition for writ of certiorari. The two cases were consolidated for further proceedings in this Court (R. 87-88).

[13] The decision of the lower court that the Secretary may declare Regulation 10(c) of this Stock Yard Company invalid without any hearing on the facts presumably would also be applicable to rate proceedings involving the "reasonableness" of rates of stockyard owners and market agencies. Both in the case of proceedings to determine whether rates are "unreasonable" and proceedings to determine whether regulations of stockyard owners are "unreasonable", the statute requires a "full hearing" to precede any secretarial determination. There are more than 500 stockyards presently regulated by the Secretary under the Act. To require the Secretary to determine the reasonableness either of rates or of stockyard company regulations without the benefit of evidence as to their "reasonableness" developed at factual hearings would be to impose an almost impossible task upon the Secretary even if it were otherwise lawful to dispense with the "full hearing" expressly required by the law.

It is conceded both by the Association and by the court below that there was no hearing on the facts in the administrative proceeding involving the Association's complaint because the Association wanted no such hearing and refused to attend such a hearing. The Stock Yard Company demanded a hearing, both on the facts and the law, at the outset of the administrative proceeding (R. 47-48); and the Stock Yard Company has always insisted that the Judicial Officer was without authority in law to order it to cease and desist from enforcing its regulation in the absence of a "full hearing" both on the relevant facts and the law. The Judicial Officer agreed with the Stock Yard Company.

In reversing the decision of the Judicial Officer with regard to the "full hearing" requirement, the lower court wholly ignored the admonition of this Court that a hearing on both the facts and the law, as provided by § 310 of the Packers and Stockyards Act, is a rudimentary procedural requirement which cannot be ignored (*Morgan* v. *United States*, 304 U.S. 1, 15).

The foregoing is, in the view of the Stock Yard Company, dispositive of the case before this Court, requiring a reversal of the opinion and judgment below.

B.

Regulation 10(c) of the Stock Yard Company Must Be Tested Under a Statutory Standard of "Reasonableness," and the Consideration of Evidence of Record—Lacking in This Case—Is Essential to Application of Such a Standard.

The lower court also concluded that the consideration of evidence was not required—indeed, that it was irrelevant—in determining the validity of Regulation 10(c) (R. 81). Despite this conclusion—which,

itself, is erroneous—, the lower court further erred by inconsistently conjecturing facts, never considered by the Judicial Officer, upon the basis of which that court concluded that the regulation would be invalid.

1.

The Stock Yard Company is Required by the Packers and Stockyards Act to Issue "Reasonable" Regulations in Respect to the Furnishing of "Stockyard Services" and Such Regulations cannot be set Aside Unless They are "Unreasonable."

The court below utterly failed to grasp the pivotal circumstance that, under the Packers and Stockyards Act, the validity of Regulation 10(c) of the Stock Yard Company depends entirely upon whether it is a "just, reasonable, and nondiscriminatory" regulation in respect to the furnishing of reasonable stockyard services at the Denver stockyard (§307 of the Act, 7 U.S.C. 1952 ed. §208). The Stock Yard Company is required, under §304 of the Act, only "to furnish upon reasonable request, without discrimination, reasonable stockyard services * * * ." (7 U.S.C. 1952 ed. § 205).

Section 201.4(a) of the general regulations of the Secretary promulgated under the Packers and Stockyards Act expressly provides that the Stock Yard Company may maintain company regulations which are not inconsistent with or in conflict with the Act or the regulations or orders of the Secretary, 9 CFR §201.4(a).

Regulation 10(c) of the Stock Yard Company imposes conditions upon which market agencies and dealers may continue to operate at the Denver stockyard.[14] Much of the buying and selling of livestock

[14] The Stock Yard Company, as the owner of the stockyard, provides stockyard services and facilities, and its rates are regulated by the Secretary. *Denver Union Stock Yard Company* v.

at the Denver stockyard is performed by market agencies, as agents for the shippers and purchasers of livestock, on a commission basis, or by dealers. It is the position of the Stock Yard Company—set forth in its answer in the administrative proceeding—that, if the registered market agencies and dealers engage in the activities prohibited by Regulation 10(c), the patrons of the Denver stockyard, whose agents buy and sell their livestock at the Denver market, will not receive the reasonable stockyard services at that market to which they are entitled (R. 44-48); and, further, that, by registering, a market agency undertakes to perform certain public functions of a fiduciary nature for its patrons at the Denver stockyard and, thereby, disenables itself to engage in the conflicting and inconsistent activities proscribed by the regulation. *Stafford* v. *Wallace*, 258 U. S. 495, 515-516; *Tagg Bros.* v. *United States*, 280 U. S. 420, 439; *Acker* v. *United States*, 298 U. S. 426, 434; *United States* v. *Corrick*, 298 U. S. 435.

Regulation 10(c) was designed to promote the furnishing of reasonable stockyard services at the Denver stockyard by requiring market agencies and dealers operating at Denver to refrain from soliciting business for markets other than Denver, from diverting livestock from the Denver market, and from engaging in certain other acts and practices which may interfere with the normal movement of livestock to the Denver market—all of which would prevent the patrons of the

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United States, 304 U. S. 470; *In Re Denver Stockyard Company*, 10 Agr. Dec. 1033. But the successful operation of the Denver stockyard—as in the case of any stockyard—depends in great measure upon the manner in which the market agencies perform their services at the stockyard. *In Re Market Agencies at Sioux City Stock Yards*, 9 Agr. Dec. 4, 22.

Denver stockyard from receiving, at that stockyard, reasonable stockyard services.[15]

Regulation 10(c) imposes no restrictions on farmers or growers of livestock or on purchasers of livestock. The patrons of the Denver stockyard are, in no manner, subject to any part of the regulation; but the Association and the other market agencies registered to operate at the Denver stockyard are charged with responsibilities and duties of a public nature. They occupy fiduciary positions at the stockyard, since they sell and buy livestock, on a commission basis, for the patrons of the stockyard who ship their livestock to the market for sale and for those patrons who place orders with the market agencies for the purchase of livestock at the market.

In speaking of the flow of commerce in livestock through the stockyards regulated under the Packers and Stockyards Act, this Court has said that "[t]he Commissionmen are essential in making the sales without which the flow of the current would be obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales and to the stock farmers and feeders," *Stafford* v. *Wallace*, 258 U. S. 495, 516. Market agencies "* * * render a personal service * * *," *Acker* v. *United States*, 298 U. S. 426, 434. As this Court has said with reference to market agencies, "[i]t is true that performance of

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[15] Compare the general regulations of the Secretary which also provide that, "[n]o market agency or licensee shall solicit consignments of livestock or live poultry at or on stockyard premises or in designated areas or after such livestock or live poultry has been billed or consigned to a market agency or licensee and is in course of transportation for delivery to the consignee at a posted stockyard or in a designated area," 9 CFR § 201.63.

the specific work done by the [market agencies operating at the "posted" stockyard at Omaha, Nebraska] does not require them to invest extensive capital. But it is essential that they employ the valuable property of the stockyards corporation * * *," *Tagg Bros.* v. *United States*, 280 U. S. 420, 438. Such market agencies "* * * perform an indispensable service in the interstate commerce in live stock. * * *" *Tagg Bros.* v. *United States, supra*, p. 439. Such market agencies are thus not mere business organizations free to follow the dictates of their own interests, but, with respect to their fiduciary functions at the Denver stockyard —like fiduciaries in general—they may properly be required to refrain from engaging in activities which would interfere with their primary obligations of trust to the regular patrons of the Denver stockyard. The fiduciary nature of their function has often been stressed by the Secretary and by the courts. *Bennett Commission Company*, 2 Agr. Dec. 194; *Midwest Farmers* v. *United States* (D. Minn.), 64 F. Supp. 91, 95. In the latter case, the Court said that

> "* * * The producer consigns his livestock to a market agency to represent him as his agent and who is supposed to have no interest except the welfare of his principal. Accordingly the producer places his financial interests in the absolute control of his agent. Consequently, the success of the livestock producing industry of the country in a large measure depends on the business practices of the stockyard agencies that sell livestock of great value. To say that much depends upon the integrity and ethics of those engaged in marketing livestock is speaking mildly * * *."

Persons who ship livestock to the Denver stockyard for sale, or who place orders at the stockyard for the purchase of livestock, have a right to expect the

utmost loyalty from their agents. They also have a right to expect their agents to refrain from engaging in any activity which would place these agents in positions which would make their interests inconsistent with those of their principals. Market agencies thus occupy a position of high trust. Manifestly, a proper performance of their functions is vital if the stockyard at which they operate is to be equipped properly to serve its patrons.

Both the Secretary and the courts have also consistently held that a stockyard owner is under a duty to refuse the use of stockyard facilities to those market agencies and other persons who will not abide by the reasonable regulations of the stockyard owner or those whose operations would interfere with the rendition of reasonable stockyard services to the regular patrons of the market. Thus, mere registration at a stockyard by a market agency or a dealer does not require the Stock Yard Company to furnish facilities to that particular market agency or dealers. *Gilbert R. Smith* v. *Union Stock Yards Company*, 9 Agr. Dec. 588.

Under the regulations of the Secretary, a market agency desiring to operate at a particular stockyard must apply to the stockyard owner for the use of pens and other facilities necessary in the conduct of the operation of the market agency (9 CFR §201.79(b)). The same regulation directs the stockyard company, in connection with such applications, to deny the use of its facilities to a market agency in any instance, *inter alia*, in which it would "impair the efficiency of operations or the reasonableness of stockyard services furnished patrons of the market." *Id.* Signifi-

cantly, the general regulations of the Secretary likewise provide that no market agency shall "* * * enter into any agreement, relationship, or association with dealers or other buyers which might have a tendency to lessen the loyalty of the market agency to its consignors or impair the quality of the market agency's selling services. * * *," 9 CFR § 201.61(a).

While the Secretary, himself, has authority to prescribe regulations affecting the conduct of operations in connection with a "posted" stockyard, the authority of the stockyard owner to regulate activities of market agencies and dealers at particular stockyards has frequently been upheld even in the absence of secretarial regulations. *Carnes* v. *St. Paul Union Stockyards Company*, 175 Minn. 294, 221 N.W. 20; *Birmingham* v. *Rice Bros.*, 238 Ia. 410, 26 N.W. 2d 39; *Gilbert R. Smith* v. *Union Stock Yards Company*, 9 Agr. Dec. 588; *Flynn* v. *Kansas City Stock Yards Company*, 12 Agr. Dec. 14; *Farmers Union Livestock Association* v. *St. Paul Union Stockyards Company*, 12 Agr. Dec. 1026; *Dougherty* v. *Union Stockyard and Transit Company*, 13 Agr. Dec. 239.

It is likewise settled that reasonable regulations under the Packers and Stockyards Act are not necessarily circumscribed by the physical boundaries of a "posted" stockyard. *In Re Tarr, Downs and Company*, 8 Agr. Dec. 517, 524; *Woarth* v. *United States* (CCA 8), 231 F. 2d 822, 824. If the activity of the market agency which is the subject of regulation has a substantial connection with the operations of the market agency at the stockyards, the regulation is valid if it is otherwise reasonable. The mere fact that

the regulation may reach collateral activities does not make the regulation suspect.[16]

It is thus clear that both the Stock Yard Company and the Secretary have authority, under the Packers and Stockyards Act, to maintain regulations with reference to operations by market agencies and dealers.

It is also clear that the Judicial Officer properly concluded that he would not be authorized to set aside Regulation 10(c) of the Stock Yard Company in the absence of evidence that it is "unreasonable."

The plain terms of the statute so provide. Such a regulation may be set aside only if the Secretary finds it to be "unreasonable." (§ 310 of the Act, 7 U. S. C. 1952 ed. § 211)

The legislative history of the Packers and Stockyards Act also shows that such a regulation may not be set aside unless it is "unreasonable." House Report No. 77, 67th Congress, 1st Sess., page 12, accompanying the bill which became the Packers and Stockyards Act, contains the following statement:

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[16] The court below cited *Nashville Union Stockyards* v. *Grissim*, 153 Tenn. 225, 280 S.W. 1015, in support of its conclusion that Regulation 10(c) of the Stock Yard Company is invalid on its face as a matter of law. But the *Grissim* case does not stand for the proposition that a market agency operating at a public stockyard may engage in activities inconsistent with its public responsibilities at the stockyard. Under the Packers and Stockyards Act, both the Secretary and the stockyard companies are authorized to maintain regulations to secure the rendition of reasonable stockyard services. Aside from this, particular statements by the Supreme Court of Tennessee made with reference to a factual situation not shown to be similar to any facts involved in the case at bar cannot be lifted out of context to support the decision of the lower court.

> "It is believed that the method for stockyard regulation above summarized is adequate to prevent the evils complained of. It is not the thought of the Committee [i.e., the House Committee on Agriculture] that the act will in any way interfere with * * * rules, regulations, or practices * * * not found by the Secretary to be unfair or unreasonable. * * * "

At page 10 of the same report, in dealing with Title III of the Packers and Stockyards Act (7 U.S.C. 1952 ed. §§ 201-217a, inclusive), it is stated that

> "This title deals with the regulation of stockyards and persons doing business thereon in interstate or foreign commerce. The procedure and language are modeled very closely on the Interstate commerce act, and the Secretary of Agriculture is given substantially the same jurisdiction over stockyard matters which the Interstate Commerce Commission has over railroads. * * * "

Section 15(1) of the Interstate Commerce Act (24 Stat. 384, as amended, 49 U.S.C. 1952 ed. § 15(1)) contains a provision authorizing the Interstate Commerce Commission to set aside railroad rates, regulations, and practices found to be "unreasonable" in almost the identical terms as those used in § 310 of the Packers and Stockyards Act (7 U.S.C. 1952 ed. § 211) which authorizes the Secretary to set aside rates, regulations, and practices of stockyard companies found to be "unreasonable." This Court has said, in *B. & O. R.R.* v. *United States*, 277 U. S. 291, 299, 300, with regard to a challenged practice of a railroad, that "* * * the Commission would not be authorized to set it aside without evidence that it is unjust, or unreasonable." As noted earlier, this Court has stated that principles developed in cases

arising under the Interstate Commerce Act are equally applicable to cases arising under the Packers and Stockyards Act, *Tagg Bros.* v. *United States*, 280 U. S. 420, 442.

With regard to the regulations of a stockyard company respecting the furnishing of stockyard services, the following passage from the opinion of the court in *Platt* v. *Lecocq* (C.C.A. 8), 158 Fed. 723, 731, upholding a regulation prescribed by a carrier, is particularly pertinent:

> "* * * the rules which it thus adopts are presumptively right and reasonable. The burden is on him who assails them to prove that they are unfair and unjust, and it is only when it clearly appears by competent evidence that they are unreasonable that commissions or courts may lawfully interfere to annul or to change them. * * *"

And, in *Louisville and Nashville R. R.* v. *United States*, 238 U. S. 1, 11, where an existing freight rate was attacked as unreasonable, this Court declared that "* * * the burden is on the complainant to establish that it is unreasonable in fact."

In the administrative proceeding, the Association deliberately refused to meet that burden by showing that Regulation 10(c) is, in fact, "unreasonable." And in the proceedings in the court below for judicial review, that court struck down the entire regulation without any evidence showing that it is, in fact, "unreasonable."

2.

The Statutory Standard of "Reasonableness" Can Not Be Applied to the Business Regulation of the Stock Yard Company Herein Involved by Any Fixed Rule of Law or Precise Formula but Only Upon Consideration of All of the Relevant Facts—Introduced in Evidence—in the Light of the Objectives of the Packers and Stockyards Act.

In holding that evidence as to the purpose, operation, and effect of Regulation 10(c) is irrelevant, the lower court totally disregarded the only manner in which the stockyard regulation may be tested, when challenged, under the standard of "reasonableness" contained in the Packers and Stockyards Act (§§ 304 and 307, 7 U.S.C. 1952 ed. §§ 205 and 208), *viz.*, by a consideration of all material facts.

In the administrative proceeding, the Judicial Officer properly held that Regulation 10(c) is a regulation in respect to stockyard services (R. 19-19) and that, on the record before him, he could not declare, solely as a matter of law, that the regulation is an "unreasonable" regulation "in respect to the furnishing of stockyard services" at the Denver stockyard (R. 32).

But the court below, totally rejecting all of the Judicial Officer's conclusions, purported to determine as a matter of law that the regulation "* * * bears no reasonable relationship to the duties required of the stockyard company under the provision [sic] of the Packers and Stockyards Act" (R. 83-84). In reaching this result, the lower court did not consider any evidence as to the relationship between the regulation and the furnishing of stockyard services at the Denver stockyard because there was no evidence to consider and also because the lower court specifically held that it was unnecessary to consider evidence in determining the validity of the regulation (R. 81).

Instead, as a matter of law, the Court of Appeals held that there could be no possible factual situation in which any part of the regulation could be reasonable (R. 81). But the Judicial Officer, being informed by experience of the manner in which regulated stockyards and market agencies operate, declared that he was unable to hold as a matter of law that no such possible factual situation could exist (R. 28). The lower court said that, "even if proved to be soundly based in fact," it was of "no legal significance" if attempts by a market agency, successful or otherwise, to divert business from the stockyard lowered the ability of both the market agency and the Stock Yard Company "to render efficient service" to the patrons of the market (R. 82). Not only does this reveal a shocking indifference to the factual nature of the controversy but also here, again, the Judicial Officer held otherwise, declaring that it could not be said that such facts, if proved, would have no "material bearing" on the validity of the regulation involved (R. 28).

The lower court thus set its fiat against the decisions of this and of other federal courts which hold that application of a standard of "reasonableness" involves a factual inquiry and an intimate understanding of the technical problems of the industry concerned, since "reasonableness" is necessarily a condition which involves factors of relation and degree and can not be resolved except by scrutiny of all pertinent facts in each case. *Sugar Institute* v. *United States*, 297 U. S. 553, 600; *Standard Oil Company* v. *United States*, 283 U. S. 163, 179; *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238. "Unreasonableness is not made out by mere assertion. * * *," *Swift and Company* v. *United States*, 343 U. S. 373, 383. See, also,

Federal Power Comm'n v. *Hope Natural Gas Company*, 320 U. S. 591, 602.

Neither may the "unreasonableness" of Regulation 10(c) be determined by application of any fixed rule of law or precise formula (Cf. *Swift and Company* v. *United States*, 316 U. S. 216, 225), because the standard of "reasonableness" imposed by the Packers and Stockyards Act has a color and content which vary with the different factual settings to which the standard is to be applied (Cf. *First National Bank* v. *Beach*, 301 U. S. 435, 438); and an issue as to the alleged "unreasonableness" of action taken by a stockyard owner, in the furnishing of stockyard services, is essentially one of fact and discretion in technical matters and is "factual rather than legal." *Kelly* v. *Union Stockyard and Transit Company* (C.C.A. 7), 190 F. 2d 860, 864; *United States* v. *Brown* (D. C. Okla.), 4 F. 2d 270, 271. See, Also, *United States* v. *Western Pacific Ry.*, 352 U. S. 59.

It has been the consistent administrative interpretation of the Packers and Stockyards Act that questions as to the "reasonableness" of particular actions taken by stockyard owners can not be determined by resort to a rule of law but must be resolved by scrutiny of all the evidence in each case as to the pertinent facts. *Gilbert R. Smith* v. *Union Stock Yards Company*, 9 Agr. Dec. 588; *Flynn* v. *Kansas City Stock Yards Company*, 12 Agr. Dec. 14; *Farmers Union Livestock Association* v. *St. Paul Union Stockyards Company*, 12 Agr. Dec. 1026; and *Dougherty* v. *Union Stockyard and Transit Company*, 13 Agr. Dec. 239.

It has also uniformly been held by this Court, under the Interstate Commerce Act (24 Stat. 379, as amended, 49 U.S.C. 1952 ed. § 1 *et seq.*)—upon which

the Packers and Stockyards Act was based (*Tagg Bros.* v. *United States*, 280 U. S. 420, 442; *Stafford* v. *Wallace*, 258 U. S. 495, 522-523)—that questions as to the "reasonableness" of rates, practices, and regulations of carriers depend upon an appreciation of all of the facts and circumstances in each particular case, *Swayne & Hoyt* v. *United States*, 300 U. S. 297, 304.

All of the authorities thus show that such words as "reasonable" are "not phrases of art with a changeless connotation" (*First National Bank* v. *Beach*, 301 U. S. 435, 440-441), but that a statutory standard employing such a term can only be applied in the light of all the facts.[17] As this Court said in *Boyce Motor Lines* v. *United States*, 342 U. S. 337, 340, "* * * few words possess the precision of mathematical symbols," and "* * * most statutes deal with untold and unforeseen variations in factual situations. * * *." The meaning of the statutory standard of "reasonableness," used in the Packers and Stockyards Act, can not be fixed in the abstract (Cf. *First National Bank* v. *Beach*, 301 U. S. 435, 438). A variety of regulations dealing with a particular stockyard service furnished at a stockyard may be "reasonable," and, after appropriate proceedings, the choice among permissive regulations is that of the Secretary. *Secretary of Agriculture* v. *Central Roig Refining Company*, 338 U. S. 604, 614. He is the agency authorized by the Congress to strike a balance as to the "reasonableness" of a par-

[17] The standard of "reasonableness" embedded in the Packers and Stockyards Act is indicative of standards of a similar nature found in a host of other regulatory statutes conferring discretionary authority on administrative officials. See *Administrative Justice and the Role of Discretion*, *Cooper*, 47 Yale Law Journal 577-582, 1938.

ticular regulation upon a consideration of all relevant factors.

When the court below concluded that Regulation 10(c) is invalid on its face as a matter of law and bears no reasonable relationship to the duties required of the Stock Yard Company under the Packers and Stockyards Act (R. 83-84), it must be remembered that the record before the court below was devoid of "* * * facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable * * *," *Chicago Board of Trade v. United States*, 246 U. S. 231, 238.

(a) *There was no evidence relative to the furnishing of "stockyard services" at the Denver Stockyard.*— Plainly, in order to determine whether Regulation 10(c) is a "reasonable" regulation in relation to the furnishing of "stockyard services" at the Denver Stockyard, a threshold factual inquiry would be properly to determine, from evidence, the type of stockyard services which are rendered at the Denver market. The statutory definition of the term "stockyard services" simply provides that the term includes

> "* * * services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock." § 301 (b) of the Act, 7 U.S.C. 1952 ed. § 201(b).

But the statute itself does not undertake to define the precise "services or facilities" to be furnished at any particular stockyard "posted" under the Act. The Act only requires the furnishing of services or facili-

ties which are reasonable. Manifestly, the exact services or facilities available at different stockyards vary. It is plain that neither the Secretary nor the court below could properly adjudicate whether the challenged regulation of the Stock Yard Company is a "reasonable" regulation in respect to the furnishing of "stockyard services" in the absence of knowledge—established by evidence of record—as to what "stockyard services" are furnished at the Denver stockyard.

(b) *There was no evidence relative to who furnishes the different kinds of "stockyard services" available at the Denver stockyard.*—Further, in order properly to relate the challenged regulation to the furnishing of "stockyard services" at the Denver stockyard, it would be necessary to consider evidence as to who renders or receives particular services. Section 304 of the Act requires both stockyard owners and market agencies to furnish, upon reasonable request, without discrimination, reasonable stockyard services at the stockyard at which they operate (7 U.S.C. 1952 ed. § 205). Thus, some "stockyard services" are rendered by the owners of public stockyards while others are rendered by the market agencies. In *Tagg Bros.* v. *United States*, 280 U. S. 420, 437 this Court—in upholding an order of the Secretary fixing the rates for the market agencies operating at Omaha, Nebraska—described in some detail the nature of operations at Omaha, calling attention to the functions of both the stockyard owner and of the market agencies, and noting that there was a division of stockyard services between the stockyard owner and the market agencies operating at the stockyard. See, also, *Acker* v. *United States*, 298 U. S. 426, 428, and *United States* v. *Corrick*, 298 U. S. 435, in which this Court also described

the different duties of market agencies at particular stockyards.

As an example of the extremely complicated organization of a typical public stockyard, reference is made to *In Re Market Agencies at the Sioux City Stock Yards*, 9 Agr. Dec. 4, which shows the necessity of considering evidence in order to understand the nature of the furnishing of stockyard services at a particular stockyard. In the *Sioux City* case, *supra*, the Judicial Officer said (9 Agr. Dec. at page 14):

> "* * * The facilities of the market place comprehend a complex organization in which definite functions are performed by the stockyard company which owns and operates the stockyard; the commission merchants or market agencies engaged in buying and selling livestock at the stockyard on a commission basis; the dealers who also buy and sell livestock for speculative purposes at the stockyard; the various classes of packer and order buyers; the Sioux City Livestock Exchange which performs certain services for the respondents and for the patrons of the stockyard; and the representatives of the Government who are stationed at the Sioux City Stock Yards, such as the market supervisor who assists in the administration of the Packers and Stockyards Act, the inspectors of the Bureau of Animal Industry of the Department whose function is to detect disease in the livestock, and the news specialists whose function is to gather and disseminate useful information relative to market conditions. In addition to the foregoing, there are facilities at the market place provided by insurance companies, railroad companies, telegraph and telephone companies, and other companies engaged in the furnishing of services essential to the operation of the market."

In the case at bar, there was nothing in the record before the court below to show which of the "stockyard

services" furnished at the Denver stockyard are furnished by the Stock Yard Company and which are furnished by the market agencies. There is no evidence as to how the Denver stockyard is organized or operated or as to the manner in which the patrons of the market receive "stockyard services." There is no evidence—because no factual hearing was held—even to show that all market agencies furnish the same stockyard services at the market.

(c) *There was no evidence relative to the effect of Regulation 10(c) upon the furnishing of "reasonable" stockyard services at the Denver stockyard.*—Also, to apply the statutory standard of "reasonableness" to the regulation of the Stock Yard Company herein involved, it would be necessary to consider evidence as to the effect of the regulation upon the furnishing of "stockyard services," both by the Stock Yard Company and by all of the market agencies at the Denver stockyard. But such evidence is also lacking.

The foregoing is not an exhaustive summary of factors which would properly have to be considered in applying the statutory standard of "reasonableness" to Regulation 10(c). Certainly, however, evidence as to the factors just enumerated would be indispensable as a minimum.

If it were known what "stockyard services" are furnished at the market, by whom they are furnished, and the effect of the challenged regulation—from a factual standpoint—upon the furnishing of those services, conclusions could then be drawn as to whether the regulation is "reasonable" or "unreasonable"—giving due weight to the major statutory purpose of the Packers and Stockyards Act, which is to promote the furnishing of reasonable "stockyard services" to

the patrons of public stockyards, *Stafford* v. *Wallace*, 258 U. S. 495.

But the court below had no such evidence before it. It decided, *in vacuo*, and without legitimate resort to any facts about the regulated business, the evils to be cured, or the way in which the regulation will affect the furnishing of stockyard services at the Denver market, that the regulation " * * * bears no reasonable relationship to the duties required of the Stock Yard Company" under the provisions of the Packers and Stockyards Act (R. 83-84).

Certainly, it cannot be said, as a matter of law, that a regulation of a stockyard owner designed to create an atmosphere in which market agencies can properly perform their duties is unreasonable. Market agencies are important to the functioning of a public stockyard. This Court has recognized the importance of their function. *Acker* v. *United States*, 298 U. S. 426, 434; *Tagg Bros.* v. *United States*, 280 U. S. 420, 439; *Stafford* v. *Wallace*, 258 U. S. 495, 515-516.

In his decision in *In Re Market Agencies at Sioux City Stock Yards*, *supra*, 9 Agr. Dec. at page 22, the Judicial Officer also recognized the importance of the function of market agencies. He said with reference to the market agencies at the Sioux City Stockyards that " * * * The Commission firms act as agent for the shipper. They furnish skilled and specialized personal services in connection with the purchase and sale of livestock * * * ." Further, the Judicial Officer said (9 Agr. Dec. at page 22) that

> " * * * The market agencies, as agents for the owners, and the different types of buyers come together under conditions of intense competition and deal with each other at arm's length in the

> strictest sense. It is the conflict between these sellers and buyers—the one seeking to obtain as much as possible for the livestock and the other seeking to pay as little as possible—that sets the market value of the livestock. * * * ."

The efficiency, therefore, with which these market agencies operate and devote themselves to their public duties determines the value of their services to the patrons of the market. *In Re Bennett Commission Company*, 2 Agr. Dec. 194; *Midwest Farmers* v. *United States* (D. C. Minn.), 64 F. Supp. 91, 95.

In view of these considerations, a regulation of a stockyard owner designed to promote the ethics of market agencies and to require them to refrain from engaging in activities inconsistent with their fiduciary responsibilities and position of public trust is reasonable if there is a proper factual basis for the regulation. The court below, in ruling that, as a matter of law, there was no reasonable relationship between Regulation 10(c) and the duties required of the Stock Yard Company quite obviously ignored the settled principles by which the validity of a stockyard regulation must be determined. The lower court plainly was not entitled to take judicial notice of complex industry facts to supply the void created by the fact-sterile record. *Ohio Bell Telephone Company* v. *Comm'n*, 301 U. S. 292, 301-302. *A fortiori*, it was error for the court to conclude that it was unnecessary to consider evidence on the issue as to the "unreasonableness" of the regulation and as to its relation to the furnishing of stockyard services at the Denver stockyard.

3.

Under the Statutory Standard, Regulation 10(c) of the Stock Yard Company May Not Properly Be Declared Invalid on the Basis of Assumed or Hypothetical Facts Conjectured by the Court Below, and that Court Erred in Holding to the Contrary.

Appropriate regard for the statutory standard of "reasonableness"—and the primary responsibility of the Secretary[18] with respect to the application of such standard—should have precluded the Court below from declaring the business regulation of the Stock Yard Company invalid on the basis of assumed or hypothetical facts conjectured by the lower court. Yet the Court of Appeals held Regulation 10(c) invalid on its face as a matter of law solely on the theory that the regulation would be invalid as applied to such hypothetical facts not in the record and never considered by the Judicial Officer.

(1) Thus, the lower court held that the challenged regulation " * * * is in immediate conflict with the requirement of Sec. 304 which contemplates and imposes the duty upon marketing [sic] agencies to render reasonable stockyard services to its [sic] customers at *every* stockyard where they do business. * * * " (Emphasis by the lower court). That court conjectured and concluded that such a "conflict" would exist if the regulation were applied to the following factual situation assumed by it:

> "If by rendering reasonable service for a Colorado customer at one stockyard a marketing [sic] agency is prohibited from rendering reasonable service for the same or a different Colorado customer at another stockyard it is apparent that the

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[18] See pp. 59-65, infra, for discussion of the primary jurisdiction of the Secretary in applying the statutory standard.

agency can not perform its statutory duty in one regard or another."[19]

But there was no evidence before the Court of Appeals that the Association, or any of the other market agencies operating at the Denver stockyard—or anyone else affected by Regulation 10(c)—is engaging, or has engaged, in furnishing stockyard services to different Colorado customers in the manner assumed by the court below in the foregoing hypothesis. The court below even assumed that the stockyard services which would be rendered to the different Colorado customers, at different stockyards, could be "reasonable" in the cases of both hypothetical customers. The lower court thus indulged in an hypothesis upon an hypothesis. It ignored the circumstance that, upon the basis of a factual record, it might be properly concluded by the Secretary that a given market agency could not render "reasonable" stockyard services at more than one stockyard. As pointed out, *supra*, there is a total absence in the record of any evidence relating to the rendition of "reasonable" stockyard services either at the Denver stockyard or at any other "posted" stockyard, or of the effect of the regulation upon the furnishing of such services.

(2) The court below also made other factual assumptions devoid of evidential support as foundations for the structure of its judgment. Thus, it concluded that the sole purpose of the regulation was to safeguard the economic interests of the Stock Yard Company (R. 82). This factual conclusion is in direct conflict with the uncontradicted allegations of the Stock Yard Com-

[19] The word "if" means "in case that; granting, allowing, or supposing that; —introducing a condition or supposition." *Webster's New International Dictionary*, Second Edition, 1939, p. 1238.

pany in its answer in the administrative proceeding (R. 44-48) that the origin of the contested regulation —as well as its purpose—was embedded in the duty of the Stock Yard Company to maintain reasonable regulations in respect to the furnishing of stockyard services as required by § 307 of the Act. (7 U.S.C. 1952 ed. § 208).

(3) Further, the court below found that the challenged regulation "wounds the public interest" (R. 83)—a holding also devoid of factual support in the record.

This Court has warned, with regard to proceedings under § 310 of the Packers and Stockyards Act, that " * * * Nothing can be treated as evidence which is not introduced as such * * *. Facts and circumstances must not be considered which should not legally influence the conclusion. * * *," *Morgan* v. *United States*, 298 U. S. 468, 480; and, in *Associated Press* v. *Labor Board*, 301 U. S. 103, 132, this Court declared that " * * * Courts deal with cases upon the basis of the facts disclosed, never with nonexistent and assumed circumstances." See, *Electric Bond and Share Company* v. *Securities and Exchange Comm'n*, 303 U. S. 419, 443; *Chicago Board of Trade* v. *Olson*, 262 U. S. 1, 42. Here, as in *First National Bank* v. *Beach*, 301 U. S. 435, 438, it may be said that " * * * Hypothetical situations are laid before us, and the argument is pressed that the definition will breed absurdity if applied to this one of them or that. We refuse to be led away from the limitations of the concrete case. * * *."

In the case at bar, the court below based its judgment solely on its own opinion—unaided by factual evidence—as to the validity of the regulation as ap-

plied to these hypothetical facts conjectured by it with respect to a market agency. Clearly, this requires a reversal by this Court.

4.

The Court Below Further Erred in Declaring the Regulation Invalid in Toto Because of the Hypothetical Facts Which it Conjectured with Reference to a Single Situation.

Moreover, because it felt that the regulation would be invalid with regard to a single hypothetical situation involving a market agency such as the Association, the Court of Appeals further erred by striking down the regulation *in toto*. Yet the regulation applies not only to market agencies but also to "dealers," who were not parties to the administrative proceeding. And the regulation likewise applies to other situations in which regulation by stockyard owners has long and universally been held valid by the Secretary and the courts.

"Dealers" are not required, by § 304 of the Act (7 U.S.C. 1952 ed. § 205), to render reasonable stockyard services. Thus, the theory upon which the court below declared that the regulation is invalid as to a "market agency"—namely, because the regulation, in the court's view, conflicted with the duties of market agencies under § 304—is wholly inapplicable in so far as a "dealer" is concerned. Obviously, the "reasonableness" or "unreasonableness" of the challenged regulation as to "dealers" depends upon a consideration of all of the facts respecting the operations of dealers at the Denver stockyard, with particular regard to the function which they perform in the livestock marketing process. See *Stafford* v. *Wallace*, 258 U.S. 496, 515-516, where this Court reviewed the essential functions of "dealers."

Also, Regulation 10(c)—which was held invalid by the court below in its entirety—applies to numerous situations in which it is universally recognized that regulation by stockyard owners is valid. For example, Regulation 10(c), *inter alia*, prohibits persons on the Stock Yard Company property from soliciting business for other markets or from interfering with consigned livestock received at the market. Such a prohibition has been held valid. *Fort Worth Stockyards Company* v. *Brown*, 161 S.W. 2d 549 (Texas).

Under the general regulations of the Secretary issued pursuant to § 407 of the Act (7 U.S.C. 1952 ed. § 228)—applicable at more than 500 regulated stockyards—the Secretary, himself, has provided that "[n]o market agency or licensee shall solicit consignments of livestock or live poultry at or on stockyard premises or in designated areas or after such livestock or live poultry has been billed or consigned to a market agency or licensee and is in course of transportation for delivery to the consignee at a posted stockyard or in a designated area," 9 CFR § 201.63. This secretarial regulation is significantly similar to Regulation 10(c) of the Stock Yard Company which was invalidated *in toto* by the Court of Appeals.

Regulation 10(c) is also identical with, or significantly similar in many respects to, the regulations of many other regulated stockyard companies. See p. 33, *supra*. These regulations—including many parts of Regulations 10(c)—have in many cases been in effect for years, and they constitute an important and vital means by which the livestock marketing process is conducted.

Yet, the effect of the action of the court below is "* * * to bar all regulation by [holding] that regu-

lation in a situation not presented would be invalid. * * * ," *Associated Press* v. *Labor Board*, 301 U. S. 103, 132. Clearly, this Court should not permit the action of the lower court to stand.

5.

Primary Jurisdiction Rests with the Secretary—Not the Reviewing Court—to Apply the Statutory Standard of "Reasonableness."

Not only did the court below completely disregard the settled principles by which the statutory standard of "reasonableness" must be applied—namely, by a consideration of evidence of record as to all of the pertinent facts— but also that court, in a shocking manner, ignored the repeated decisions of this Court which clearly show that primary jurisdiction rests with the Secretary—not a reviewing court—to apply the statutory standard of "reasonableness."

Thus, in disposing of this case on the basis of assumed or hypothetical facts conjectured by it, the lower court ignored the circumstance that none of the factual assumptions which it conjectured was the subject of findings or conclusions by the Judicial Officer in the administrative proceeding. Indeed, the Judicial Officer carefully and pointedly refrained from making any finding as to the "reasonableness" or "unreasonableness" of the challenged regulation because of the absence in the record of essential factual evidence upon which such findings must depend (R. 16). Clearly, until the Secretary has made a finding as to the "reasonableness" or "unreasonableness" of Regulation 10(c) and as to other pertinent facts, the matter is not properly subject to judicial inquiry.

Here, for example, the Judicial Officer made no finding with regard to the situation involving the

hypothetical market agency conjectured by the court below. The Judicial Officer likewise made no finding that the challenged regulation was or was not issued to safeguard the economic interests of the Stock Yard Company, or that the challenged regulation, to use the words of the court below, "wounds the public interest" (R. 83). Clearly, primary jurisdiction lay with the Secretary to consider all such matters. *Kelly* v. *Union Stockyard and Transit Company* (CCA 7), 190 F. 2d 860, 864; *United States* v. *Brown* (D. C. Okla.) 4 F. 2d 270, 271. See, also, *United States* v. *Western Pacific Ry.*, 352 U. S. 59. This Court has pointed out that, under the Packers and Stockyards Act, " * * * the Secretary is the guardian of the public interest in regulating a business of public concern * * * ," *United States* v. *Morgan*, 313 U. S. 409, 415. Until the Secretary has found that a regulation "wounds the public interest," or is contrary to the public policy embedded in the Packers and Stockyards Act, or conflicts with some provision of the Packers and Stockyards Act, " * * * the fact can not be said to exist, and meantime it is not subject to judicial inquiry and proof. * * * ," *United States* v. *Brown* (D. C. Okla.), 4 F. 2d 270, 271. The courts are not the arbitors of the paramount public interest, because this is the business of the Secretary "made such by the very terms of the statute." (Cf. *United States* v. *Pierce Auto Lines*, 327 U. S. 515, 535, 536).

Furthermore, in other respects also, the court below completely departed from the accepted function of a court charged with reviewing the action of an administrative agency which has primary responsibility for the administration of an important regulatory statute.

In the case at bar, the Judicial Officer properly

concluded that, before he could relate the challenged regulation to the statutory standard of "reasonableness," it would be necessary for him to consider evidence (R. 32); and he was warranted in dismissing the complaint when the Association—upon whom rested the burden of proof—refused to come forward at a hearing with such evidence.

The Judicial Officer, in reaching this result, gave careful consideration to every argument advanced

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[20] The Judicial Officer gave careful and extensive consideration to the Association's arguments that Regulation 10(c) should be declared invalid on its face as a matter of law, without a factual hearing, *inter alia*, because of the general laws relating to public utilities and the antitrust laws (R. 24-32). The Judicial Officer concluded correctly that the validity of a regulation of a public utility necessarily involves a factual inquiry as to its "reasonableness" (R. 28). A public utility must deal only with those persons who comply with the reasonable regulations established by the utility to conduct its affairs for the benefit of its patrons, and a utility may deny services and facilities to those who interfere with the primary duty of the utility to its patrons. *DeVries v. Sig Ellingson and Company* (D. Minn.), 100 F. Supp. 781; 786, affirmed 199 F. 2d 677 (CCA 8); *Carnes v. St. Paul Union Stockyards*, 175 Minn. 294, 221 N.W. 20; *Birmingham v. Rice Bros.*, 238 Iowa 410, 26 N.W. 2d 39. Also, a public utility is not prevented from entering into reasonable contractual relations which do not interfere with its public responsibilities. *Twin City Pipe Line Company v. Harding Glass Company*, 283 U. S. 353, 355-357. The question of the reasonableness of action taken by a public utility is one of fact and each case must largely depend upon the circumstances involved. *Manufacturers Ry. v. United States*, 246 U. S. 457, 481. As to "posted" stockyards, it has been determined by the Secretary that they are not required to furnish services or facilities to every market agency or dealer. *Gilbert R. Smith v. Union Stock Yards Company*, 9 Agr. Dec. 588. The Secretary's regulations provide that stockyard owners must not furnish services or facilities to market agencies if it would interfere with the "efficiency of operations or the reason-

by the Association to support its contention that Regulation 10(e) is invalid on its face as a matter of law and that a factual hearing to determine its invalidity is unnecessary, finding such arguments to be without merit."

The court below was clearly unwarranted in rejecting the Judicial Officer's conclusions in these respects and in substituting its judgment for that of the Judicial Officer. *United States* v. *Morgan*, 313 U. S. 409, 417; *Acker* v. *United States*, 298 U. S. 426, 433-434; *St. Joseph Stock Yards Company* v. *United States*, 298 U. S. 38, 51; *Tagg Bros.* v. *United States*, 280 U. S. 420, 442-445. See, also, *Securities and Exchange Comm'n* v. *Central Illinois Corporation*, 338 U. S. 96, 127; *Levinson* v. *Spector Motor Company*, 330 U. S. 649, 672; *National Labor Relations Board* v. *Hearst Publications*, 322 U. S. 111, 131; *Colgate Palmolive Peet Company* v. *United States*, 321 U. S. 67, 87-89; *Gray* v. *Powell*, 314 U. S. 402, 411-413; *United States* v.

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ableness of stockyard services furnished patrons of the market" (9 CFR 201.79(b)).

To the extent that it was proper for the Judicial Officer to consider the antitrust argument of the Association in the administrative proceeding under the Packers and Stockyards Act (Compare, *Manufacturers Ry.* v. *United States*, 246 U. S. 457, 480, *McLean Trucking Company* v. *United States*, 321 U. S. 67, 73-88, and *Federal Communications Comm'n* v. *RCA Communications*, 348 U. S. 86, 91-97, with *Georgia* v. *Pennsylvania R. R.*, 324 U. S. 439), he properly concluded (R. 32) that it would be necessary to consider evidence as to the purpose, operation, and effect of Regulation 10(e), in the light of the facts surrounding the marketing of livestock at the Denver stockyard, before any conclusions could be reached with respect to the antitrust laws. *United States* v. *DuPont and Company*, 351 U. S. 377, 413; *Sugar Institute* v. *United States*, 297 U. S. 553, 600; *Standard Oil Company* v. *United States*, 283 U. S. 163, 179; *Chicago Board of Trade* v. *United States*, 246 U. S. 231, 238.

American Trucking Association, 310 U. S. 534, 549; *Norwegian Nitrogen Products Company* v. *United States*, 288 U. S. 294, 315. In *St. Joseph Stock Yards Company* v. *United States*, *supra*, this Court said (298 U. S. at page 51):

> "* * * The court does not sit as a board of revision to substitute its judgment for that of the legislature or its agents as to matters within the province of either. * * *."

Here, as in *Securities and Exchange Comm'n* v. *Chenery Corporation*, 332 U. S. 194, 208, it may properly be said that the Judicial Officer's conclusion

> "* * * rests squarely in that area where administrative judgments are entitled to the greatest amount of weight by appellate courts. It is the product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies * * *. It is the type of judgment which administrative agencies are best equipped to make and which justifies the use of administrative process. See *Republic Aviation Corporation* v. *Labor Board*, 324 U. S. 793, 800. Whether we agree or disagree with the result reached, it is an allowable judgment which we can not disturb."

What this Court said in upholding a rate order of the Secretary as "reasonable" under the Packers and Stockyards Act also is particularly appropriate with regard to the decision of the Judicial Officer involved in the case at bar. In *United States* v. *Morgan*, 313 U. S. 409, this Court stated at p. 415 that:

> "* * * Doubts and difficulties incapable of exact resolution confront judgment. More than that, since the Secretary is the guardian of the public interest in regulating a business of public concern it is not for him merely to reflect the items

> on a profit and loss statement. He must consider whether these represent services which properly should be charged to the public. * * *"

At page 417 of its opinion in the same case, this Court said:

> "* * * We have canvassed too fully in the past the duties respectively allotted to the Secretary of Agriculture and the courts in the enforcement of the Packers and Stockyards Act to justify extended discussion of the governing principles. * * * We are in the legislative realm of fixing rates. This is a task of striking a balance and reaching a judgment on factors beset with doubts and difficulties, uncertainty and speculation. On an ultimate analysis the real question is whether the Secretary or a court should make an appraisal of elements having delusive certainty. Congress has put the responsibility on the Secretary and the Constitution does not deny the assignment."

The action taken by the Court of Appeals in this case is especially shocking in view of the circumstance that the Judicial Officer never reviewed the hypothetical facts conjectured by the court which furnished the sole basis for its action. Thus, the lower court not only substituted its judgment for that of the Judicial Officer but also it did this on the basis of factual conjectures not considered by the administrative official having primary responsibility in the premises. Such action by the court below is in direct conflict with the applicable decisions of this Court and is a far departure from the accepted and usual course of judicial proceedings.

The court below was not called upon to determine the validity of the challenged regulation of the Stock Yard Company. The simple question before that court related to whether the Judicial Officer's decision to

dismiss the administrative proceeding was proper in view of the Association's refusal to submit any evidence as to the "unreasonableness" of Regulation 10(c).

In view of the action of the court below, this Court is now called upon to determine whether the Court of Appeals properly performed its function as a reviewing court by substituting its judgment for that of the Judicial Officer. Clearly, the court below did not fulfill its proper role when it refused to recognize the primary responsibility of the Secretary under the Packers and Stockyards Act but, instead, itself undertook to determine the validity, as a matter of law, of an important regulation dealing with a highly complex livestock marketing problem.

II.

THE COURT OF APPEALS WAS NOT AUTHORIZED TO INTERFERE WITH THE DISCRETIONARY AUTHORITY CONFERRED EXCLUSIVELY BY THE CONGRESS UPON THE SECRETARY AND TO "DIRECT" THE SECRETARY—WITHOUT ANY FACTUAL RECORD—TO ENTER A CEASE AND DESIST ORDER IN THE ADMINISTRATIVE PROCEEDING.

The Court of Appeals in another respect wrongfully invaded the discretionary area conferred by the Congress exclusively upon the Secretary. The judgment of the court below directs the Judicial Officer "* * * to vacate the order dismissing [the Association's] complaint and enter an appropriate order requiring the Denver Union Stock Yard Company to cease and desist from issuing or enforcing its Regulation 10(c)."[21] (R.

[21] Attention has already been called to the error of the court below in striking the regulation down in its entirety, simply because the court was of the opinion that the regulation would be invalid in a single hypothetical situation conjectured by it with reference to "market agencies." See, *supra*, pp. 57-59.

84). The Court of Appeals had no authority to impose such directions upon the Judicial Officer even if the latter had erred—which he did not—in dismissing the complaint filed by the Association. The authority of the reviewing court is limited by the Hobbs Act (5 U.S.C. 1952 ed. (Supp. IV) § 1032) to an order "* * * to enjoin, set aside, suspend (in whole or in part), or to determine the validity of" the final order of the Judicial Officer (See also, 5 U.S.C. 1952 ed. § 1039(a)). That final order in this proceeding was the order dismissing the Association's complaint.

Thus, had the Judicial Officer, himself, decided after a full hearing that part or all of Regulation 10(c) is invalid as applied to the Association, he would have had several discretionary courses open to him. He could "determine and prescribe what will be the just and reasonable * * * regulation * * * to be thereafter followed." He, at his discretion, could have issued an order that the Stock Yard Company should "cease and desist from such violation," and that order could, again in the Judicial Officer's discretion, be limited "to the extent to which the Secretary finds" that such violation "does or will exist" (§ 310 of the Act, 7 U.S.C. 1952 ed. § 211). But the court below preempted to itself all of this discretionary authority.

This Court has made it clear that, in reviewing the actions of administrative agencies for errors of law, the reviewing courts have no authority to "* * * foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. * * *." *Federal Communications Comm'n* v. *Pottsville Broadcasting Company*, 309 U. S. 134, 145. If, indeed, the Judicial Officer had committed an error of law, the only appropriate judg

ment would have been to direct the Judicial Officer "* * * to proceed within the framework of [his] own discretionary authority on the indicated correct principles * * *." *Rochester Telephone Corporation v. United States*, 307 U. S. 125, 136. See *Securities and Exchange Comm'n v. Chenery Corporation*, 332 U. S. 194, 200-201; *Ford Motor Company v. Labor Board*, 305 U. S. 364, 374; and *Federal Radio Comm'n v. Nelson Bros. Company*, 289 U. S. 266, 278.

Thus, it is clear that, under no circumstances, did the court below have authority to direct the Judicial Officer as to the type of order to be entered in the administrative proceeding.

Moreover, if the judgment of the lower court is permitted to go into effect,[22] the Secretary, acting through the Judicial Officer, is not only confronted with a mandate to strike down this particular regulation without any factual hearing but, also, he will be confronted with a problem arising from the fact that regulations similar to the one herein involved are in force in many of the major stockyards posted under the Act. See pp. 33, 58, *supra*.

These regulations have undoubtedly played an important part in the stockyards industry for years. Clearly, both the stockyard companies involved and the Secretary will be faced with an overwhelming difficulty if all these regulations are to be stricken down as a matter of law.

If the judgment of the lower court is reversed, the Secretary will be free to entertain any such proceedings with reference to Regulation 10(e)—or similar

[22] The judgment of the Court of Appeals has been stayed pending consideration of the case by this Court (R. 84).

regulations of other stockyards—as he may deem appropriate in carrying out his responsibilities under the Packers and Stockyards Act. Any such proceedings may be entertained by the Secretary either upon complaint or upon his own initiative, if he deems such proceedings necessary. It is to be presumed that the Secretary will carry out his duty in this regard just as, in the administrative proceeding herein involved, he gave the Association every opportunity to pursue the customary procedure for resolving issues such as those raised by the Association, *viz.*, a procedure involving an orderly hearing on the facts so as to enable an intelligent decision to be made.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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APPENDIX A

Pertinent Provisions of the Packers and Stockyards Act of 1921, as Amended

Sec. 301, 7 U.S.C. 1952 ed. § 201:

When used in this chapter—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying, or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock;

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" mean any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser.

Sec. 304, 7 U.S.C. 1952 ed. § 205:

It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: *Provided*, That in any State where the weighing of livestock at a stockyard is conducted by a duly authorized department or agency of the State, the Secretary, upon application of such department or agency, may register it as a market agency for the weighing of livestock received in such stockyard, and upon such registration such department or agency and the members thereof shall be amenable to all the requirements of this chapter; and upon

failure of such department or agency or the members thereof to comply with the orders of the Secretary under this chapter he is authorized to revoke the registration of such department or agency and to enforce such revocation as provided in section 216 of this title.

Sec. 307, 7 U.S.C. 1952 ed. § 208:

It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

Sec. 310, 7 U.S.C. 1952 ed. § 211:

Whenever after full hearing upon a complaint made as provided in section 210, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter in such case observed as both the maximum and minimum to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services more or less than the rate or charge so prescribed; and (3) shall conform to and observe the regulation or practice so prescribed.

APPENDIX B

Regulation 10(c) of the Stock Yard Company

(Tariff No. 14 of the Denver Union Stock Yard Company, Regulation 10(c), on File in the Livestock Division, Agricultural Marketing Service, U. S. Department of Agriculture)

"Item 10

Interference with Operations

"(a) . . .

"(b) . . .

"(c) No market agency or dealer engaging in business at this Stockyard shall, upon Stock Yard Company property, or elsewhere, nor shall any other person upon Stock Yard Company property—

(1) Solicit any business for other markets, for sale at outside feed yards or at country points, or endeavor to secure customers to sell or purchase livestock elsewhere; or

(2) In any manner divert or attempt to divert livestock from this market which would otherwise normally come to this Stock Yard; or

(3) Engage in any practice or device which would impair or interfere with the normal flow of livestock to the public market at this Stockyard.

"The normal marketing area from which livestock would normally come to the public market at this Stockyard, and which is the area to which this subdivision (c) shall apply, is defined as all of the state of Colorado except that part listed as follows:

"The area lying east of the line beginning with the westerly boundary of the County of Sedgwick where it intersects the Nebraska state line; thence south along the county line of Sedgwick and Phillips counties; thence west and south along the western boundary of Yuma county to its

intersection with U. S. Highway 36; thence west to Cope and south along Colorado Highway 59 to Eads, Colorado; thence westerly along Highway 96 to Ordway; thence south on Highfway 71 to Timpas; thence southwesterly via Highway 350 to Trinidad; thence south to New Mexico state line.

"The provisions of paragraph (c) do not apply on livestock solely used for breeding purposes."